Pertama Makmur Sdn Bhd v Hong Leong MSIG Takaful Bhd (formerly known as Hong Leong Tokio Marine Takaful Bhd)

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-265–09 OF 2015
MOHD NAZLAN JC
13 OCTOBER 2016

Agency — Fraudulent agent — Agent acting in fraud of principal — Plaintiff took out contractor's all risks policy ('CAR') from defendant ('insurer') through its agent — Defendant's agent misappropriated premiums paid by plaintiff and forged extension of policy documents — Accident occurred and plaintiff filed insurance claim against defendant — Whether defendant as principal should be liable for fraud of agent — Whether agent was not authorised given alleged non-fulfillment of terms of Takaful contract

Insurance — Contractor's all risks policy — Claims — Plaintiff together with joint-venture partner ('JV') secured construction contract — Plaintiff took out contractor's all risks policy ('CAR') from defendant ('insurer') through its agent — Upon expiry of policy, plaintiff paid premiums for extension of policy — Defendant's agent misappropriated premiums paid by plaintiff and forged extension of policy documents — Accident occurred and plaintiff filed insurance claim against defendant — Whether extended policy was cancelled by defendant — Whether defendant was negligent — Whether claim limited to only 50% based on JV — Whether claim excessive and fraudulent — Whether insurance claim fell within CAR insurance policies

Pertama Makmur Sdn Bhd ('the plaintiff'), together with its joint venture partner, AS Masa Sdn Bhd ('the JV'), secured a contract from Dewan Bandaraya Kuala Lumpur ('DBKL') for the construction of a multilevel junction ('the project'). The plaintiff took out three Takaful contractor all risks insurance policies ('CAR insurance policies') and two workmen compensation insurance policies ('WCI policies') from the defendant for the project. In relation to that, the plaintiff dealt with one Mr Chong Wai Sung, an agent acting on behalf of the defendant ('the agent'). Upon the expiry of the policies, the plaintiff secured an extension for the period from 19 September 2011–10 March 2014. The plaintiff had paid the total premium sum to the agent for all the policies. Subsequently, an accident occurred during the extended period of Takaful coverage and consequently, the plaintiff filed a claim under the Takaful contract for the loss suffered. It must be noted that, the Takaful contract contained a requirement that notice of loss must be given directly by the insured to the insurer within 14 days of its occurrence, however,

no such notice of loss was given by the plaintiff to the defendant. The plaintiff had only given verbal notice to the agent. To make the matter worse, it was found that the agent had misappropriated part of the premiums paid by the plaintiff and dishonestly forged an endorsement purporting to extend the period of Takaful coverage under the said Takaful contract without the knowledge or authorisation of the defendant. The defendant averred that it was not bound by the conduct of its agent who fraudulently forged the relevant extension documents and appropriated the premium whereas the plaintiff maintained that the defendant was responsible for its agent and the policy remained valid. Hence the present action filed by the plaintiff. The issues for determination were: (a) whether the defendant as principal should be liable for the fraud of the agent; (b) whether the extended policy was cancelled by the defendant ('the cancellation'); (c) whether the agent was not authorised given alleged non-fulfillment of the terms of the Takaful contract; (d) whether the defendant was negligent; (e) whether the claim was limited to only 50% given the JV; (f) whether the claim excessive and fraudulent; and (g) whether the insurance claim fell within CAR insurance policies.

Held, allowing the plaintiff's claim for damages to be assessed, interest at 5% annually on the damages to be so assessed and costs ('the plaintiff's claim'):

(1) The forgery per se was neither authorised by the principal and nor did the agent had the authority to commit the same. But the forgery, whilst specifically unauthorised, was committed within the scope of the usual authority of the agent in the conduct of his business. The defendant was liable because the forgery was committed within the scope of his authority as an agent of the defendant. The law thus could not but rendered the defendant liable for the forgery of its agent (see para 43).

(2) In the present case, it was not disputed that the payments were made to and received by the agent. He was the lawful agent of the defendant at the material time. Clause 1 of the Takaful contract deems payments made to the agent as being received by the principal. Based on the evidence and on the balance of language of Clause 1 of the Takaful contract, the purported cancellation because of the purported non-payment in full of the premium or Takaful contributions by the plaintiff, was unjustified and wrongful (see paras 49–51).

(3) The arguments about the absence of written request from the plaintiff and of any written approval from the defendant were, on evidence, inconsequential, for the defendant ought to be estopped from selectively insisting compliance with the same. On the facts, the defendant had never insisted on strict adherence to these provisions when the Takaful contract was first extended from 19 September 2011–10 March 2014. In addition, the evidence clearly showed that the plaintiff had informed the defendant's agent within 14 days of the loss taking place. The defendant

should rightfully be estopped from denying liability on the basis of the alleged non-adherence to the requirements of the policy (see paras 55–56 & 74).

(4) It was true that the defendant had played absolutely no part in the criminal aspect of the forgery. There was however no evidence to show what control and monitoring mechanism that the defendant adopted to ensure that its agents do not abuse the procedure that allowed them to be in possession of premiums paid by the clients of the defendant were in fact channeled by the agents to the defendant as their principal. The defendant must take responsibility for this lapse that had enabled its own agents to take advantage of the same and abuse the procedure and commit forgery instead. However, even if the court found the defendant to be negligent, the law would not countenance or accord the plaintiff a greater protection under the law of tort than that for which the plaintiff had agreed to under the law of contract (see paras 80–81 & 89).

(5) Based on particularly cll 2.4 and 2.5 of the JV agreement, the plaintiff was unmistakably entitled to claim only up to 50% of the alleged losses suffered, in accordance with its proportion to the plaintiff's share in the JV (see para 96).

(6) There was no sufficient evidence that the defendant had on a balance of probabilities successfully established the claim by the plaintiff to be fraudulent or excessive. The plaintiff's claim was made on the basis of the supporting documents available to the plaintiff then as well as on the premise of the invoices furnished by the contractors to rectify the damage and to reconstruct the tunnel following the collapse. Further, at trial, the plaintiff disclosed that discounts had subsequently been given to the plaintiff by the relevant contractors and third parties, and the amount being claimed was as a result being reduced to RM5,510,859.81. This was done without any prompting by the defendant and thus justifiably could not be characterised as reflecting the presence of bad faith on the part of the plaintiff in the presentation of its claim (see paras 110–111).

(7) On the totality of evidence, there was sufficient basis that the claim by the plaintiff did come within the terms of the policy. This was premised predominantly on the evidence of the various documents furnished by the plaintiff to support its claim, which appeared to be in relation to the losses said to be suffered by the plaintiff within the category of either 'material damage' which pertained to physical loss or damage from any cause necessitating repair or replacement under section I of the policy or 'third party liabilities' under section II, which essentially concerned accidental loss or damage to property belonging to third parties occurring in direct connection with the construction of items covered under section I in the vicinity of the site (see para 117).

(8) On the totality of the evidence, the court found that the plaintiff had successfully proven its claim against the defendant on a balance of probabilities, who was therefore liable to the claims for losses under the policy/extended policy suffered by the plaintiff, which however was limited to only 50% of the total claims arising from the losses which in any event was to be assessed by the registrar (see para 124).

[Bahasa Malaysia summary

Pertama Makmur Sdn Bhd ('plaintif'), bersama rakan kongsi usahasamanya, AS Masa Sdn Bhd ('US tersebut'), telah memperoleh suatu kontrak daripada Dewan Bandaraya Kuala Lumpur ('DBKL') untuk pembinaan suatu simpang bertingkat ('projek tersebut'). Plaintif telah mengambil tiga polisi insurans Takaful kontraktor semua risiko ('polisi insurans KSP') dan dua polisi insurans pampasan pekerja ('polisi IPP') daripada defendan untuk projek tersebut. Berkaitan itu, plaintif telah berurusan dengan Mr Chog Wai Sung, seorang ejen yang bertindak bagi pihak defendan ('ejen tersebut'). Selepas polisi-polisi tersebut luput, plaintif telah memperoleh lanjutan bagi tempoh dari 19 September 2011–10 Mac 2014. Plaintif telah membayar keseluruhan jumlah premium kepada ejen tersebut untuk semua polisi-polisi tersebut. Berikutan itu, satu kemalangan telah berlaku semasa tempoh lanjutan perlindungan Takaful itu dan seterusnya, plaintif telah memfailkan tuntutan di bawah kontrak Takaful untuk kehilangan yang dialami. Ia perlu dinyatakan bahawa, kontrak Takaful yang mengandungi satu keperluan agar notis kehilangan diberikan secara terus oleh pihak yang diinsuranskan kepada penanggung insurans dalam tempoh 14 hari dari kejadiannya, walau bagaimanapun, tiada notis kehilangan sedemikian telah diberikan oleh plaintif kepada defendan. Plaintif hanya telah memberikan notis secara lisan kepada ejen tersebut. Untuk menjadikan keadaan lebih buruk, ia didapati bahawa ejen tersebut telah menyalahgunakan sebahagian daripada premium yang dibayar oleh plaintif dan secara tidak jujur telah memalsukan endorsmen yang bermaksud untuk melanjutkan tempoh perlindungan Takaful di bawah kontrak Takaful tersebut tanpa pengetahuan atau kebenaran defendan. Defendan menegaskan bahawa ia tidak terikat oleh kelakuan ejennya yang secara palsu menipu dokumen-dokumen lanjutan berkaitan dan menyalahgunakan premium tersebut manakala plaintif menegaskan bahawa defendan adalah bertanggungjawab ke atas ejennya dan polisi tersebut kekal sah. Justeru tindakan ini difailkan oleh plaintif. Isu-isu untuk ditentukan adalah: (a) sama ada defendan sebagai prinsipal patut bertanggungjawab kerana penipuan ejen tersebut; (b) sama ada polisi lanjutan tersebut dibatalkan oleh defendan ('pembatalan tersebut'); (c) sama ada ejen tersebut tidak diberi kuasa berdasarkan terma-terma kontrak Takaful yang dikatakan tidak penuhi; (d) sama ada defendan cuai; (e) sama ada tuntutan terhad kepada hanya 50% berdasarkan US tersebut; (f) sama ada tuntutan itu melampau dan palsu; dan (g) sama ada tuntutan insurans tersebut dalam skop polisi insuran KSP.

Diputuskan, membenarkan tuntutan plaintif untuk ganti rugi ditaksir, faedah pada 5% setiap tahun berdasarkan ganti rugi untuk ditaksir dan kos ('tuntutan plaintif'):

(1) Pemalsuan sahaja tidak dibenarkan oleh principal dan ejen tersebut tidak mempunyai kuasa untuk melakukan yang sama. Namun begitu pemalsuan itu, walaupun tidak dibenarkan secara spesifik, telah dilakukan dalam skop kuasa biasa seorang ejen dalam perlakuan perniagaannya. Defendan bertanggungjawab kerana pemalsuan itu telah dilakukan dalam skop kuasanya sebagai ejen defendan. Undang-undang dengan itu tidak boleh tetapi menjadikan defendan bertanggunjawab kerana pemalsuan ejennya itu (lihat perenggan 43).

(2) Dalam kes ini, ia tidak dipertikaikan bahawa bayaran-bayaran telah dibuat kepada dan diterima oleh ejen tersebut. Dia adalah ejen defendan yang sah masa matan. Fasal 1 kepada kontrak Takaful menganggap bayaran telah dibuat kepada ejen tersbeut sebagai diterima oleh prinsipal. Berdasarkan keterangan dan atas imbangan bahasa Fasal 1 kepada kontrak Takaful itu, pembatalan yang dikatakan itu kerana premium atau sumbangan Takaful yang dikatakan tidak bayar penuh oleh plaintif, adalah tidak wajar dan salah (lihat perenggan 49–51).

(3) Hujah tentang ketiadaan permintaan bertulis daripada plaintif dan tentang apa-apa kebenaran bertulis daripada defendan adalah, atas keterangan, tidak penting, untuk defendan patut diestop daripada secara selektif mendesak pematuhan yang sama. Berdasarkan fakta, defendan tidak pernah mendesak pematuhan ketat terhadap peruntukan-peruntukan tersebut apabila kontrak Takaful pertama kali dilanjutkan dari 19 September 2011–10 Mac 2014. Tambahan lagi, keterangan jelas menunjukkan bahawa plaintif telah memberitahu ejen defendan dalam 14 hari tentang kehilangan yang berlaku. Defendan patut sewajarnya diestop daripada menafikan liabiliti berdasarkan ketidakpatuhan yang dikatakan terhadap keperluan polisi tersebut (lihat perenggan 55–56 & 74).

(4) Ia adalah benar bahawa defendan tidak memainkan apa-apa peranan langsung dalam aspek jenayah pemalsuan tersebut. Walau bagaimanapun tiada keterangan menunjukkan mekanisme kawalan dan pengawasan yang telah diguna pakai oleh defendan bagi memastikan bahawa ejennya tidak menyalahgunakan prosedur yang membenarkan mereka memiliki premium yang dibayar oleh pelanggan defendan yang sebenarnya disalurkan oleh ejen-ejen tersebut kepada defendan sebagai prinsipal mereka. Defendan perlu mengambil tanggungjawab untuk tempoh ini yang membolehkan ejennya sendiri mengambil kesempatan yang sama dan menyalahgunakan prosedur dan melakukan pemalsuan itu sebaliknya. Namun begitu, walau pun mahkamah mendapati defendan cuai, undang-undang tidak bersetuju atau memberikan plaintif

perlindungan lebih di bawah undang-undang tort daripada apa yang telah dipersetujui oleh plaintif di bawah undang-undang kontrak (lihat perenggan 80–81 & 89).

(5) Berdasarkan fasal-fasal 2.4 dan 2.5 tertentu perjanjian US, plaintif dengan jelas berhak terhadap tuntutan hanya sehinggan 50% daripada kehilangan yang dikatakan telah dialami, menurut bahagiannya kepada syer plaintif dalam US tersebut (lihat perenggan 96).

(6) Tiada keterangan yang mencukupi bahawa defendan telah atas imbangan kebarangkalian berjaya membuktikan tuntutan oleh plaintif adalah palsu atau melampau. Tuntutan plaintif telah dibuat berdasarkan dokumen sokongan yang sedia ada kepada plaintif pada masa itu dan juga atas premis invois-invois tersebut dikemukakan oleh kontraktor-kontraktor untuk membetulkan kerosakan dan untuk membina semula terowong berikutan keruntuhan itu. Selanjutnya, semasa perbicaraan, plaintif mendedahkan bahawa diskaun itu kemudiannya telah diberikan kepada plaintif oleh kontraktor-kontraktor berkaitan dan phak-pihak ketiga, dan jumlah yang dituntut adalah hasil yang dikurangkan kepada RM5,510,859.81. Ini telah dilakukan tanpa apa-apa desakan oleh defendan dan oleh itu adalah wajar untuk tidak disifatkan sebagai menggambarkan kewujudan niat jahat di pihak plaintif dalam pembentangan tuntutannya (lihat perenggan 110–111).

(7) Berhubung keseluruhan keterangan, terdapat asas yang mencukupi bahawa tuntutan oleh plaintif terangkum dalam terma-terma polisi tersebut. Ini berasaskan sebahagian besarnya pada keterangan pelbagai dokumen yang dikemukakan oleh plaintif untuk menyokong tuntutannya, yang kelihatan berkaitan dengan kerugian yang dikatakan telah dialami oleh plaintif dalam kategori sama ada 'material damage' yang berkaitan kehilangan atau kerosakan fizikal daripada apa-apa sebab yang memerlukan pembaikan atau penggantian di bawah seksyen I polisi atau 'third party liabilities' di bawah seksyen II, yang terutamanya berkenaan kehilangan atau kerosakan yang tidak sengaja ke atas hartanah yang dimiliki pihak ketiga yang berlaku akibat kaitan secara langsung dengan pembinaan benda-benda yang terangkum di bawah seksyen I dalam kawasan tapak tersebut (lihat perenggan 117).

(8) Berdasarkan keseluruhan keterangan, mahkamah mendapati bahawa plaintif telah berjaya membuktikan tuntutannya terhadap defendan atas imbangan kebarangkalian, yang mana dengan itu bertanggungjawab terhadap tuntutan kerana kehilangan di bawah polisi/polisi lanjutan yang dialami oleh plaintif, yang mana bagaimanapun adalah terhad kepada hanya 50% daripada keseluruhan tuntutan yang timbul daripada kehilangan yang dalam apa-apa keadaan perlu ditaksir oleh pendaftar (lihat perenggan 124).]

Notes

For a case on agent acting in fraud of principal, see 1(2) *Mallal's Digest* (5th Ed, 2015) para 1431.

For a case on claims, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 96.

Cases referred to

AXA Affin Assurance Bhd v MTD Construction Sdn Bhd [2013] 6 MLJ 323, CA (refd)

Agapitos and another v Agnew and others [2002] 1 All ER (Comm) 714; [2003] QB 536, CA (refd)

Antara Steel Mills Sdn Bhd v CIMB Insurance Brokers Sdn Bhd [2015] 6 MLJ 248, CA (refd)

Armagas Ltd v Mundogas SA; The Ocean Frost [1986] 2 All ER 385, HL (refd)

Bahamas International Trust Co Ltd and another v Threadgold [1974] 3 All ER 881; [1974] 1 WLR 1514, HL (refd)

Beacon Carpets Ltd v Kirby and another [1984] 2 All ER 726, CA (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Cavenagh Investment Pte Ltd v Kaushik Rajiv [2013] 2 SLR 543, HC (refd)

Central Lorry Service Co Sdn Bhd v The American Insurance Co [1981] 2 MLJ 40 (refd)

Chien Chung Ming v Kay Hian & Co Pte & Anor [1992] 1 SLR 242; [1992] 1 CLJ 725, HC (refd)

Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd [1977] 1 MLJ 244 (refd)

Galloway v Guardian Royal Exchange (UK) Ltd [1997] All ER (D) 14; [1997] EWCA Civ 2487, CA (refd)

Jones Construction Co v Alliance Assurance Co Ltd [1961] 1 Lloyd's Rep 121, CA (refd)

KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10, FC (refd)

Keppel Bus Co Ltd v Sa'ad bin Ahmad [1972] 2 MLJ 121; [1972] 1 LNS 53, CA (refd)

Lee Seng Heng v Guardian Assurance Co Ltd [1977] 1 MLJ 244 (refd)

Lister and others v Hesley Hall Limited [2001] UKHL 22, HL (refd)

Lloyd (Pauper) v Grace, Smith & Co [1912] AC 716, HL (folld)

Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826; [2009] 6 CLJ 653, CA (refd)

Mayban Factoring Bhd v Koperasi Pekerja-pekerja Jabatan Perdana Menteri Malaysia Bhd [2001] 4 MLJ 337, CA (refd)

Modern Universal Sdn Bhd v MSIG Insurance (M) Bhd (formerly known as Hong Leong Assurance Bhd) [2014] 11 MLJ 186, HC (refd)

Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur [1969] 1 MLJ 123 (refd)

New Zealand Shipping Company Limited v Société des Ateliers et Chantiers de France [1919] AC 1, HL (refd)
NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38; [2002] 2 MLRA 510, CA (refd)
Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd [1985] 2 All ER 395; [1985] 1 Lloyd's Rep 274, QBD (refd)
Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip [1995] 3 MLJ 74, PC (refd)
Shan & Gooi (suing as a firm of advocates & solicitors) v Capital Insurance Bhd & Ors [2011] MLJU 440; [2012] 8 CLJ 626, HC (refd)
Siaw Kim Seong v Siew Swee Yin (f) & Anor [2009] 1 MLJ 349, CA (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Bank Ltd and Others [1986] AC 80, PC (refd)
Teck Liong (EM) Sdn Bhd v Hong Leong Assurance Sdn Bhd and another suit [2002] 1 MLJ 300; [2001] 7 CLJ 457, HC (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)
Uxbridge Permanent Benefit Building Society v Pickard [1939] 2 All ER 344, CA (refd)
WJ Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 All ER 127, CA (refd)
Yarm Road Ltd and another v Hewden Tower Cranes Ltd [2003] All ER (D) 04 (Aug); [2003] EWCA Civ 1127, CA (refd)
Yeo Tin Sang v Lim Choo Kee [1961] 1 MLJ 23, CA (refd)

Legislation referred to

Contracts Act 1950 ss 182, 182(a), (b), 191
Islamic Financial Services Act 2013 s 6, Schedule 9, s 12, 12(1), (2)
Penal Code s 463
Rules of Court 2012 O 18 r 11

Sanjay Mohan (K Gobinath with him) (Mohanadass Partnership) for the plaintiff.
T Sudhar (Alex Lee with him) (Shook Lin & Bok) for respondent.

Mohd Nazlan JC:

INTRODUCTION

[1] This is a writ action for claims made under a Takaful contract. Following conclusion of trial, I found liability against the Takaful operator. This judgment contains the full reasons for my decision.

CONTEXT

[2] This case raises a number of questions revolving around the central issue of the liability of a principal for the wrong committed by his agent. The principal in this instant case is an insurance company, or more accurately, a Takaful operator. The plaintiff and the defendant entered into a Takaful contract which states that the Takaful coverage shall expire on the date specified therein. Significantly, it is also stated as a condition that any request for an extension of the period of Takaful coverage shall be made in writing by the participant or insured ('the plaintiff') and shall further be subject to the agreement of the takaful operator/insurer ('the defendant').

[3] Unfortunately for the parties, an agent of the defendant ('the agent') misappropriated part of the premiums paid by the plaintiff meant for the defendant and dishonestly forged an endorsement purporting to extend the period of Takaful coverage under the said Takaful contract without the knowledge or authorisation of the defendant. The agent was charged and convicted for the offence of forgery and was sentenced to a term of imprisonment (whilst serving his jail term, he attended as a witness called by the defendant). Takaful contributions had thus been paid by the plaintiff to the agent for the purported extension, a sizeable part of which, given the forgery, was never channeled to or received by the defendant as the principal.

[4] An incident occurred, and losses ensued as a result, during the period of Takaful coverage which had purportedly been extended. The plaintiff filed a claim under the Takaful contract for the loss. It is not disputed that no evidence of any written request for such an extension by the plaintiff was produced, and nor was any agreement by the defendant for the extension tendered in the proceedings. The Takaful contract also contains a requirement that notice of loss must be given directly by the insured to the insurer within 14 days of its occurrence. No such notice of loss is given by the plaintiff to the defendant. Instead, only a verbal notice was given to the agent.

KEY BACKGROUND FACTS

[5] The plaintiff, Pertama Makmur Sdn Bhd is a construction company. The defendant, Hong Leong MSIG Takaful Bhd is a licensed Takaful operator involved primarily in the business of managing family Takaful. The plaintiff, together with its joint venture partner, secured a contract from Dewan Bandaraya Kuala Lumpur ('DBKL') for the construction of a multilevel junction at the intersection of Jalan Imbi, Jalan Hang Tuah and Jalan Pudu in Kuala Lumpur ('the project').

A **[6]** It was a requirement for the contractor undertaking the project that a contractor's all risk policy ('CAR insurance policy') and a workmen's compensation policy must be secured. The plaintiff pleaded that it took out three Takaful contractor all risks insurance policies and two workmen compensation insurance policies from the defendant for the project. The B plaintiff dealt with the agent, one Mr Chong Wai Sung, trading under the name and style of Alps Solution (a sole proprietorship), and acting as the agent of the defendant for this purpose; and the first CAR insurance policy (Takaful Certificate No TK0008458–01–8) and the workmen's compensation policy were both dated 9 April 2009, and for the period of coverage from 23 March C 2009–18 September 2011. The requisite premiums were duly paid to the agent on 5 May 2009.

[7] Upon the expiry of the same, an extension was then secured for the D period from 19 September 2011–10 March 2014, as evidenced by Takaful Certificate No TK00036322–01–3 dated 12 January 2012 ('the policy'). For this new coverage, the total premium sum of RM764,536.56 was paid, again to the agent, in various instalments, over a period of between November 2011–May 2012.

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[8] It is not disputed that the agent sent across to the defendant some of the premiums, but not all. The defendant did not deny receiving such part payment. This was the point in time when, unknown to the parties, the agent dishonestly misappropriated the rest of the premium payments paid by the F plaintiff.

[9] However, because the plaintiff, as far as the defendant was concerned, did not make full payment of the premiums to the defendant (because the latter did not receive the same from the agent), the defendant sought to cancel the G policy under the Takaful contract. On 2 January 2013, the defendant issued Endorsement No 003 to cancel the policy with effect from 14 May 2012 due to non-payment in full of the Takaful contributions. It is significant to note however, that the plaintiff was not notified nor warned of this purported cancellation.

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[10] Nevertheless, since the plaintiff considered the policy to continue to subsist, another extension was subsequently sought for the coverage period of from 11 March 2014–10 December 2014, and the same is contended by the plaintiff to have been granted by way of Endorsement No 3 dated 2 April 2014 I purportedly issued by the defendant ('the extended policy'), with the full premium of RM223,270.75 subsequently paid to the agent. As it subsequently turned out, in similar fashion, the said Endorsement No 3 for the extended policy had been forged by the agent, who had also pocketed the said premium entirely for himself, a fact known to the parties only much later.

[11] On 2 April 2014, which was a date within the coverage period of the extended policy, a partial collapse of Jalan Pudu at the site of the project occurred which is said to have resulted in loss and damage to the plaintiff, triggering this claim under the Takaful contract by the plaintiff against the defendant. The plaintiff notified the agent of the intention to make a claim on 4 July 2014 but as it subsequently transpired that the latter took too long to respond to the former, the plaintiff contacted the defendant directly to enquire on the status of the claim in January 2015 when the parties herein became aware of the fraud committed by the agent. The defendant took the position that it is not bound by the conduct of its agent who fraudulently forged the relevant extension documents and appropriated the premium, and the plaintiff maintained that the defendant is responsible for its agent and the policy remains valid. Hence this action filed by the plaintiff.

[12] The essential terms of the policy read amongst others as follows:

> CONTRACTORS' ALL RISKS TAKAFUL CERTIFICATE
>
> ...
>
> Now this Takaful Certificate witness that subject to the Participant (PMSB) having paid to the Operator (HLMSIG) the contribution mentioned in the Schedule and subject to the terms, exclusions, provisions and conditions contained herein or endorsed hereon takaful benefits will be paid to the Participant in the manner and to the extent hereinafter provided: ...

[13] The claim of the plaintiff can be classified under two heads of claim. Originally, the first is for the sum of RM4,442,601.65 which was the cost incurred by the plaintiff in purchasing materials, securing labourers and renting machineries from the suppliers and the submission-contractor to rectify the partial tunnel collapse. The second claim is for the sum of RM2,776,182.20 which was in turn the demands made by third parties against the plaintiff as a result of the incident at the site. Subsequently, given reductions granted by relevant parties, the claim is lowered to RM3,164,756.44 and RM2,346,103.37 for the material damage and third party liabilities claims, respectively.

THE CRUX OF THE CASE OF THE LITIGANTS

For the plaintiff

[14] The claim by the plaintiff is simple enough. Since the extended policy, being the CAR insurance policy, was extended by Endorsement No 3 dated 2 April 2014, as so furnished by the defendant's agent, Endorsement No 3 thus binds the defendant as it represents an extension to the CAR insurance policy originally dated 12 January 2012. The plaintiff had paid to the defendant's agent the necessary premium, RM223,270.75 to be exact, in relation to

Endorsement No 3. This is not disputed. The plaintiff had thus fulfilled its part of the bargain. As the principal, which the defendant clearly is in the instant case, the defendant is under the law bound by the action of its agents, the defendant must thus be liable for the losses of the plaintiff. The plaintiff therefore contends that the defendant is obliged to compensate the plaintiff in accordance with the terms of the extended policy under the Takaful contract.

[15] It is a key contention of the plaintiff that relying on authorities, particularly s 191 of the Contracts Act 1950 and the House of Lords decision in *Lloyd (Pauper) v Grace, Smith & Co* [1912] AC 716, notwithstanding that the forgery was committed by the defendant's agent who personally benefitted from the criminal act, and the defendant was neither in the know nor in any manner a beneficiary of the forgery, the defendant is nevertheless liable for the act of its agent.

[16] The plaintiff also asserted that the defendant failed to ensure it has a proper system of monitoring its own agents and thus was negligent in its handling of its relationship with the plaintiff as an insured.

[17] The defendant had thus wrongfully repudiated its liability under the CAR insurance policy without taking into consideration that it was their own agent who had committed the fraud. Despite its agent having the authority to receive premiums from the plaintiff on the defendant's behalf, the defendant had failed to have a proper system of monitoring its agent.

For the defendant

[18] The defendant on the other hand, primarily asserted that it should not be bound by the forged endorsement to indemnify the insured for the loss claimed. It is the primary contention of the defendant that until and unless the conditions precedent to the extension of the 'period of cover' of the policy are fulfilled, no extension can validly take effect. Non-fulfillment must therefore mean that there was no authorization by the defendant for the agent in question to accept or receive Takaful contributions for the extensions of the 'period of cover' of the policy.

[19] The two requirements in the conditions precedent stated in the policy are firstly that there must be a written request for extension of the coverage period by the plaintiff, and secondly, there must be a subsequent agreement on the part of the defendant on any such request for extension. The defendant contended that the plaintiff knew or ought to have known of these dual requirements and it is no excuse if the plaintiff did not read the policy. The plaintiff had thus contributed to its own loss, for if it had apprised itself of its rights and obligations under the policy, the defendant argued that the plaintiff

would have known that the purported Endorsement 003 was a forgery and would not have fallen for the deceit by the agent.

[20] In addition, the notification of claim clause in general condition No 5 (read with general condition No 1) of the policy stipulates that, upon the occurrence of a matter giving rise to a claim, the plaintiff ought to 'immediately notify the Operator by the telephone or telegram as well as in writing' and that no Takaful benefits shall be paid where 'no notice has been received by the Operator within 14 days of its occurrence'.

[21] Yet the defendant did not receive any formal notification from the plaintiff until very much later by way of a letter dated 28 January 2015. This clearly does not comply with the requirement of general condition No 5 (read with general condition No 1). The plaintiff's argument that the plaintiff had reported the incident which happened on 2 July 2014 to the defendant's agent two days later on 4 July 2014 is not supported in that the agent in his testimony confirmed that the purported letter from the plaintiff dated 4 July 2014 to the agent was in fact prepared by the agent himself. In any event, even if there was formal notification to the agent, the defendant submitted that case law authorities have established that notification of claim to the agent of an insurer is insufficient.

[22] The defendant also alleged that the plaintiff had made an exaggerated and inflated insurance claim which amounted to a fraudulent claim under the Takaful contract. This, according to the defendant, means that not only would the plaintiff be disentitled to recover any genuine loss which could be proven, but that it also renders the benefits under the Takaful contract entirely forfeited.

THE TRIAL AND THE WITNESSES

[23] The trial of the suit was held over three days on 3 May 2016–5 May 2016. The plaintiff called five witnesses, as follows:

(a) Rachel Soo Pat Li, the plaintiff's admin and accounts manager ('PW1');

(b) Nor Azman bin Ahmad, the plaintiff's project manager ('PW2');

(c) Gary Tan Wai Min, the plaintiff's head of contracts ('PW3');

(d) Soo Jen Li, the plaintiff's former admin and accounts manager 2003–2013 ('PW4'); and

(e) Dato' Ir Hj Manan bin Amir, Director, Khairi Consult Sdn Bhd (the civil and structural engineer consultant for the project).

[24] The defendant called four witnesses. They were:

A (a) Chong Sook Yin, Head of Finance, RHB Insurance Bhd (formerly the defendant's Head of Finance) ('DW1');

(b) Kamariah bt Mohd Amin, the defendant's General Takaful Claims manager ('DW2');

B (c) Chong Wai Sung, formerly the agent of the defendant, now serving prison term ('DW3'); and

(d) Jeffrey Shah bin Abdul Wahab, the defendant's general manager.

C EVALUATION BY THIS COURT

Whether the defendant as principal should be liable for the fraud of the agent

[25] It is a principle of agency in the law of contract that a principal will not D be liable for a particular act or inaction of his agent after the contracting party has notice of the principal's repudiation of the agent's authority to do or not to do such act. It cannot be denied that the plaintiff had no inkling of the forgery committed by the defendant's agent. To be fair, neither was knowledge on the part of the plaintiff implied by the defendant. Indeed, even the rogue agent E who was called as a witness ('DW3') confirmed that the plaintiff had no knowledge of the forgery and that he had only revealed his crime subsequent to the queries raised by plaintiff on the status of their claims with the defendant in January 2015. The agent gave evidence in his cross-examination on this point as follows:

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SJM:	Thank you very much. So this is what you forged. And did you receive payments for this?
Wai:	Yes.
SJM:	And this payment also you did not forward to the defendant, correct?
Wai:	No because it is a forged document.

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[26] It is a principle of law of high authority that a principal is liable for the H fraud of his agent committed while acting within the scope of his authority. In *Lloyd (Pauper) v Grace, Smith & Co* [1912] AC 716, a solicitors' clerk fraudulently engineered a conveyance from a client, but subsequently disposing of the latter's house for the former's personal benefit. The House of Lords ruled that a principal is liable for the fraud of his agent acting within the I scope of his authority, and that it is irrelevant whether the fraud is committed for the benefit of the principal or that of the agent. Lord Macnaghten held instructively as follows:

> Lord Blackburn's view of the judgment in *Barwick's Case (2)* requires no explanation. It is clear enough. After referring to *Barwick's Case (2*) he expresses

himself as follows (5): 'I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This no doubt was a very technical question'; and then come these important words: 'The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud'.

That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud. I think, too, that the expressions 'acting within his authority', 'acting in the course of his employment', and the expression 'acting within the scope of his agency' ... as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used it must be construed liberally ...

[27] In *Yeo Tin Sang v Lim Choo Kee* [1961] 1 MLJ 23, Thompson CJ for the Court of Appeal held that where injury or loss is caused to a third person by the wrongful act of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent. In *Chien Chung Ming v Kay Hian & Co Pte & Anor* [1992] 1 SLR 242; [1992] 1 CLJ 725, the stock broker company was held liable for the fraud of its remisier agent against the third party client, where the High Court, Singapore held, quoting *Boustead on Agency* (15th Ed), that an act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.

[28] This principle that a principal is liable to the third party for the wrong committed by his agent acting within authority has been applied in a number of other cases such that the position on this point concerning the liability of principal ought to be considered as settled law. This is even though some of these other cases, including a number of them referred to by the plaintiff, did not address the issue directly concerning a principal and agent relationship, but more in terms of the vicarious liability of employer for the wrong committed by his servant under the law of tort.

[29] Thus, in another decision of the House of Lords in *Lister and others v Hesley Hall Limited* [2001] UKHL 22 it was ruled that an employer is vicariously liable for the torts of their employees who committed sexual abuse as there was 'relative closeness' connecting the tort and the nature of an individual's employment which established liability in that case. In addition, in *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653 it was held that the wrong complained of was so closely connected with the acts that the servant was authorised to do, which thus justified a finding of vicarious liability, applying cases such as *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1972] 2 MLJ 121; [1972] 1 LNS 53 on the principle of an

A employer being responsible for the act of its employee, in the course of his employment. But the Court of Appeal in *Maslinda Ishak* also relied on the similar concept applied in the context of an agency and principal relationship. Suriyadi Halim Omar JCA (as he then was) stated thus:

B > [21] With the above findings concretised, the respondents must jointly and severally bear the burden of the first defendant's liability. It is trite law that when an injury or loss is caused to a third person by the wrongful act of an agent acting within the scope of his authority his principal is jointly and severally liable with him (*Yeo Tin Sang v Lim Choo Kee* [1961] MLJ 23).

C **[30]** I say that the position in law on the liability of a principal like the defendant in the instant case for the alleged loss suffered by a third party such as the plaintiff for the fraud committed by an agent, acting on behalf of the defendant ought in Malaysia to be considered as settled also because this principle is in any event already statutorily enacted in s 191 of the Contracts Act 1950. It is apposite that I set out the provision of s 191 of the Contracts Act 1950 which states as follows:

D > 191 Effect, on agreement, of misrepresentation or fraud by agent
>
> Misrepresentation made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentation or frauds had been made or committed by the principals; but misrepresentation made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

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F **[31]** This s 191 of the Contracts Act 1950 was applied by the Court of Appeal in *Mayban Factoring Bhd v Koperasi Pekerja-pekerja Jabatan Perdana Menteri Malaysia Bhd* [2001] 4 MLJ 337. In that case, one Mejamok Enterprise ('Mejamok') and the appellant entered into a factoring agreement wherein the appellant was assigned seven invoices involving a purported purchase of mineral pots by the respondent from Mejamok. The issue was whether the dealings between Mejamok and the secretary of the respondent in matters relating to certain invoices would bind the respondent thereby resulting in its liability to pay the amount stipulated in the factoring agreement entered into between the appellant and Mejamok. Abdul Kadir Sulaiman JCA (as he then was) found the respondent liable on the basis of s 191 and stated as follows:

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I > [2] Mejamok was not a total stranger to the respondent as the respondent had admitted that it had had previous dealings with the respondent as its appointed agent in the supply of mineral pots. If at all there was any representation made, or fraud committed by the secretary acting in the course of the respondent's business, the conduct was imputed to the respondent under s 191 of the Contracts Act 1950. The respondent could not escape liability to the appellant, an innocent party, in respect of the debts which arose out of the factoring agreement made with notice despite it not being communicated to it by its authorised agent. The appellant was

entitled to rely on the ostensible authority of the secretary to act on the respondent's behalf. A

[32] Another statutory basis which finds liability on the part of the defendant for the conduct of its agent is probably the most pertinent, for the statutory scheme directly concerns the Takaful industry. Section 12(2) of Schedule 9 to the Islamic Financial Services Act 2013 ('the IFSA'), in my view drafted in a language in harmony with s 191 of the Contracts Act 1950, provides for the act of the agent to be deemed to be that of the Takaful operator, in the following terms: B C

12 Knowledge of, and statement by takaful agent

(1) A person who is authorized by a licensed takaful operator to be its takaful agent and who solicits or negotiates a contract of takaful in that capacity shall be deemed, for the purpose of the formation or variation of the contract of takaful, to be the agent of the licensed takaful operator and the knowledge of that takaful agent shall be deemed to be the knowledge of the licensed takaful operator. D

(2) A statement made, or an act done, by the takaful agent shall be deemed, for the purpose of the formation or variation of the contract of takaful, to be a statement made, or act done, by the licensed takaful operator notwithstanding the takaful agent's contravention of subparagraph 11(1) or any other provision of this Act. E

(3) Subparagraph (1) shall not apply —

(a) where there is collusion or connivance between the takaful agent and the proposer in the formation or variation of the contract of takaful; or F

(b) where a person has ceased to be a takaful agent of a licensed takaful operator and the licensed takaful operator has taken all reasonable steps to inform, or bring to the knowledge of takaful participants of the fact of such cessation. G

[33] In my view, the words 'for the purpose of the formation or variation of a contract of Takaful' must necessarily be construed similar to the concept of matters falling within the scope of the authority of the agent as found in case law and in s 191 of the Contracts Act 1950. In the instant case, plainly the act of the agent in outwardly handling the extension of the policy and the issuance of the extended policy, albeit in truth are forgeries, was unmistakably for the purpose of the 'formation or variation' of the policy and extended policy under the Takaful contract for the plaintiff, whose rights and interests, like those of the other Takaful participants, the Islamic Financial Services Act 2013 seeks to protect. Under s 6 of the same Act, it is plainly stated that in pursuing the principal regulatory objectives of the Act, the Central Bank of Malaysia shall among others, foster fair, responsible and professional business conduct of H I

A Islamic financial institutions, and strive to protect the rights and interests of consumers of Islamic financial services and products.

[34] The above said statutory formulations in both the Contracts Act 1950 and the Islamic Financial Services Act 2013, as plainly drafted, are not much
B difference from the essence of the judgment of the House of Lords in *Lloyd (Pauper) v Grace, Smith & Co* referred to earlier. The principal issue in this context could potentially be whether the defendant can validly argue that the forgery did not fall within the authority of the agent of the defendant which thus renders the defendant not liable (see further below). Thus, the defendant's
C case that the alleged loss which occurred on 2 July 2014 had happened after the expiry of the period of Takaful coverage under the policy (which was 10 March 2014), and therefore was not within the coverage under the policy cannot be sustained.

D *The defendant cannot be liable on basis of forged documents?*

[35] The other key but related argument of the defendant is that Endorsement 003 dated 2 April 2014 relied upon by the plaintiff in support of
E its claim that there was an extension of the 'period of cover' of the Takaful contract from 11 March–10 December 2014, is a forged document. As was the case with the letter of acknowledgement of claim dated 28 July 2014. These are forged documents and thus have no legal effect. Thus the defendant cannot be held liable on the basis of claims on forged documents. The defendant referred
F to a number of cases to support this contention that a forged document or instrument is a nullity and has no effect.

[36] These include the decision of the former Supreme Court in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, that
G of the Court of Appeal in *Siaw Kim Seong v Siew Swee Yin (f) & Anor* [2009] 1 MLJ 349, the earlier decision of Raja Azlan Shah J (as HRH then was) in *Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur* [1969] 1 MLJ 123, and specifically to the following passage from the judgment of Gopal Sri Ram JCA (as he then was), for the Court of Appeal in *Boonsom Boonyanit v Adorna*
H *Properties Sdn Bhd* [1997] 2 MLJ 62 who held that:

> ... it is axiomatic that a forged instrument is null and void and of no effect (see *Kreditbank Cassel GMBH v Schenkers Ltd* [1927] 1 KB 826 at p 834, per Bankes LJ). It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under
I a void instrument.

[37] It is in my view quite clear however that these cases, whilst stating the general principle on the legal effect of forgery, are no authority in the context of the liability of a principal where the forgery is committed by its agent. In my

judgment, a forgery committed by an agent acting within the scope of his authority cannot provide a valid basis for the principal to repudiate liability to the parties. Notwithstanding the forgery, and despite the nullity of the forged document, the law would still impose liability on a principal for the conduct of its agent in perpetuating the crime to the detriment to a third party. This proposition of law is well in accord with the principle enunciated by the House of Lords in *Lloyd (Pauper) v Grace, Smith & Co*, and is equally fully consistent with s 191 of the Contracts Act referred to earlier.

[38] Indeed, a careful review of the case of *Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur* referred to by the defendant to support its assertion, in fact reveals the reverse. In that case, the plaintiffs, without knowledge that local orders presented to them by the office messenger employed by the defendants were forgeries, sold and delivered certain goods to the defendants through the office messenger. The orders were forged by the office messenger and the defendants never received the goods. The High Court dismissed the claim by the plaintiffs. But the basis was the finding of lack of evidence that the office messenger had acted within authority. Raja Azlan Shah J (as HRH then was) instructively stated the following:

> Although it is correct to hold that the present plaintiffs have a right to assume that all matters of internal management in the defendants' department had been duly complied with and that they would not be affected by irregularities of which they had no notice, that rule applies only to irregularities that might otherwise affect a genuine transaction. *It cannot apply to a forgery. In my opinion this point is fatal to the plaintiffs' case and therefore they can make no claim against the defendants except upon one of two grounds, either that the defendants are estopped from setting up the forgeries (see Greenwood v Martin's Bank Ltd* [1933] AC 51*) or that the office messenger had such ostensible authority as to render his employers, the defendants, liable for his act in presenting the orders and taking delivery of the goods*. (Emphasis added.)

[39] Furthermore, according to the headnotes of the reported judgment, the High Court held as follows:

> The office messenger did not have authority to guarantee the genuineness of the local orders which were forgeries. As the defendants did not hold him out to the plaintiffs as having authority to issue local orders and as it was not part of his duties to issue them, the defendants were not vicariously liable to the plaintiffs for the forgeries committed by the office messenger.

[40] Thus, I do not think it can be disputed that the question to be asked to ascertain the presence of liability of a principal in a situation of a fraud or forgery committed by an agent is essentially one of whether the conduct in issue is within the scope of the authority of the agent under the agency-principal contractual relationship.

[41] But the defendant appears not to take much issue with this question whether the agent could properly be said to have acted within the scope of his authority when committing the forgery in this context (although it did formulate its argument in contending that the plaintiff's alleged non-compliance with terms of policy meant that the agent was not clothed with the requisite authority, see below). And I do not at any rate consider the question to be a contention worthy of much dispute for in my view the agent's dealings with the plaintiff, his handling of extension requests, collection of premiums, preparation of Endorsement No 3 as well as of other letters, all of which are matters that an agent, like the agent in the instant case, similarly circumstanced would ordinarily do, as indeed the agent had done in previous extension exercise with the plaintiff, are squarely within the usual scope of the authority of the agent. But the exact conduct on the part of the agent which outwardly and on the face of it appears innocuous in reality was fraudulent in nature due to the commission of the criminal act of forging documents and misappropriation of premium.

[42] As strenuously argued by the defendant, I agree that the defendant never authorised the agent to commit forgery. It is a self-evident truism that no professional principal would authorise any crime to be committed by its agent. And it is also trite, as made clear by the defendant in reference to a number of cases (such as *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543) that an agent cannot have any authority to commit forgery. But that is not how the issue of authority of the agent ought to be dealt with, vis a vis the question of whether liability ought to be ascribed to the principal. In the instant case, as mentioned, the conduct which made possible the forgery is well within the scope of the authority of the agent.

[43] In other words, I would put it simply in this manner. The forgery per se was neither authorised by the principal and nor did the agent have the authority to commit the same. But the forgery, whilst specifically unauthorised, was committed within the scope of the usual authority of the agent in the conduct of his business. The defendant is liable because the forgery was committed within the scope of his authority as an agent of the defendant. The law thus cannot but render the defendant liable for the forgery of its agent. Any other reading of the law on this issue would be plainly misconceived and entirely unwarranted.

[44] In *Lloyd (Pauper) v Grace, Smith & Co*, the principal was held liable for the fraud of the agent because conveyancing is part of the ordinary business of solicitors. The client had been invited by the firm to deal with their clerk who was found to be an agent for the firm. The clerk's fraudulent act in handling relevant documentation was of the class or kind of acts which fall within the ordinary business of solicitors. Thus, while the phrase 'acting within the scope

of authority' of the agent may not capable of being defined with exactitude, it is not necessarily a herculean task to determine whether or not any particular wrong fall within the requisite authority either. It pretty much depends on the facts.

[45] For completeness I should also add that I do not consider that the fact that the instant case involves the forgery of the documents, incontrovertible on evidence, including based on the admission by the agent himself, would make any valid difference to the principle that a principal is liable for the fraudulent conduct of his agent acting within authority since I would construe this principle to admit of forgery as a form of a fraud. After all, s 463 of the Penal Code defines forgery as the making of any false document with intent to commit fraud. The case referred to earlier too did not even attempt to draw any distinction between fraud and forgery when analysing the question on the liability of the principal. Fraudulent acts in this context should rightfully include forgeries (see also *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 All ER 344). In my view the key proposition ought to be on whether a wrong committed by an agent was done within the scope of his authority.

[46] It could also be said that the forgery is an issue between the defendant and its agent. From the plaintiff's perspective, defendant had issued a valid policy and that the plaintiff had paid the defendant for this insurance policy in full, consequent upon the extension thereof by virtue of Endorsement 003, and that reliance could be also had on cl 1 of the Takaful contract (see further below) which deems payments received by the agent as having been collected by the defendant and the policy is accordingly valid and binding. Given the finding that the agent had acted within the scope of his authority, the plaintiff was fully entitled to rely on the representation and actions of the agent which bind the defendant. The law allows for the plaintiff to decide whether to affirm or rescind the contract as result of the fraudulent conduct of the agent. The plaintiff has clearly chosen to affirm the contract and now seek to rely on its rights pursuant to the said Takaful contract.

[47] As such, in my judgment, it is manifest that under the law the defendant ought to be held liable for the loss to the plaintiff, being the contracting third party, resulting from the forgery committed by the agent of the defendant.

Whether the extended policy was cancelled by the defendant

[48] This was originally one of the key issues to be considered in the trial of this suit. The defendant however submitted that it did not wish to pursue the same following the clear testimony of the agent ('DW3') that he did indeed receive the entire premium for the policy and the extended policy from the

plaintiff but fraudulently kept most of it to himself. This of course validates the case of the plaintiff that it had fully paid all premium due under the Takaful contract for the policy and the extended policy.

[49] This confirmation is of considerable importance because it immediately brings into play the application of cl 1 of the Takaful contract which in effect deems payments made to the agent as being received by the principal. Clause 1 of the Takaful contract provides the following:

> Where the contribution payable pursuant to this warranty is received by an authorized agent of the Operator; the payment shall be deemed to be received by the Operator for the purposes of this warranty and the onus of proving that the contribution payable was received by a person including a Takaful agent, who was not authorized to receive such a contribution shall lie on the Operator.

[50] In the instant case, it was not disputed that the payments were made to and received by the agent ('DW3'). He was the lawful agent of the defendant at the material time. Clause 7 thus operates to deem receipt of the payment by the defendant itself, despite the same was in fact collected by the agent, unless the defendant could demonstrate that the agent was not authorised to receive the said payment from the plaintiff. This, the defendant clearly did not manage nor attempt to accomplish, not least due to the evidence that the defendant had actually only terminated the agent's appointment in 2015, well after payments were received by the agent during 2014.

[51] As such, based on the evidence and on the language of cl 1 of the Takaful contract, the purported cancellation by the defendant, of the policy with effect from 14 May 2012 (and thus, the extended policy) under the Takaful contract pursuant to endorsement 003 dated on 2 January 2013, on account of the purported non-payment in full of the premium or Takaful contributions by the plaintiff, was unjustified and wrongful.

Whether agent was not authorised given alleged non-fulfillment of the terms of the Takaful contract

Absence of written request for extension by plaintiff and approval by defendant

[52] The defendant did however argue that the purported extension involves the non-fulfillment of conditions precedent to the extension of the 'period of cover' under the Takaful contract which divested the agent of the authority to undertake the extension request. Non-fulfillment must therefore mean that there was no authorisation by the defendant for the agent in question to accept or receive Takaful contributions for the extensions of the 'period of cover' of the policy.

[53] The first of the two requirements in the conditions precedent is that there must be a written request for extension of the coverage period by the plaintiff to the defendant. It is not in dispute that there was no such written request furnished to the defendant. The defendant never received any written request for extension. The second requirement is that the defendant must agree to the proposed extension. indeed, the first witness of the plaintiff, Rachel Soo, its admin and accounts manager ('PW1') confirms that no written request was sent by the plaintiff to the defendant. The relevant part of the 'period of cover' clause in the policy reads thus:

> ... At the latest the Takaful coverage shall expire on the date specified in the Schedule. Any extensions of the Period of Takaful the participant is required to submit written request and shall subject to the absolute discretion of the Operator.

[54] Thus it was argued that the defendant could only accept the risk for the period which was expressly specified in the schedule to the policy. The defendant could not be forced to assume additional risks, unless it had agreed to extend the period of risk (see the decision of the English Court of Appeal in *Jones Construction Co v Alliance Assurance Co Ltd* [1961] 1 Lloyd's Rep 121).

[55] In my judgment, there is little substance in this contention of the defendant. The defendant had never insisted on strict adherence to these provisions when the Takaful contract was first extended from 19 September 2011–10 March 2014 (as per the Takaful Certificate No TK00036322–01–3 dated 12 January 2012). Then, the plaintiff had similarly dealt entirely with the agent of the defendant. Furthermore, the agent did, for the defendant, albeit fraudulently issued Eendorsement 003 to confirm extension of the policy now subject to dispute.

[56] The arguments about the absence of written request from the plaintiff and of any written approval from the defendant are therefore, on evidence, inconsequential, for the defendant ought to be estopped from selectively insisting compliance with the same. I can do no better than reproduce what was held by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 on the application of the doctrine of estoppel, as follows:

> [2] The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. Estoppel is a doctrine of wide utility and could be resorted to in varying fact patterns to achieve justice. Indeed the circumstances in which the doctrine may operate are endless.
>
> [3] It is not an integral part of the doctrine of estoppel that a litigant who invokes the doctrine of estoppel must prove that he was

induced by the conduct of his opponent to act in a particular way, as all that a representee need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Likewise, the requirement that the representee should have acted to his detriment is also not part of the doctrine. In this respect, all that needs to be shown is that, in the particular circumstances of a case, it would be unjust to permit the representor or encouragor to insist upon his strict legal rights.

[4] It is correct to state that estoppel is a matter which requires to be pleaded under the Rules of Court, as exemplified by rr 7(1) and 8(1) of the O 18 Rules of the High Court 1980. However, the requirement of these rules is sufficiently met if the material facts giving rise to estoppel are sufficiently pleaded without actually using the term 'estopped'. Thus, although courts do normally require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular case out of the governing principle.

[5] A court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interest of justice to do so. It is really a matter of the particular judge who, when deciding where the justice of the case lies, must have due regard to all the circumstances of the case.

[57] The defendant could also be deemed to have waived the said requirements, a consequence well established by the authorities, as the following passage from the judgment of the English Court of Appeal referred to by the plaintiff in *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 where Lord Denning MR held:

> The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so — see *Plasticmoda Soc per Azioni v Davidsons Manchester Ltd* [1952] 1 Lloyd 527, 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them.

[58] The defendant further argued that the plaintiff's belief that it had procured an extension of the policy was brought about by the plaintiff's own misguided reliance on the agent. The defendant cited the House of Lords decision in *Armagas Ltd v Mundogas SA; The Ocean Frost* [1986] 2 All ER 385 which contains the following passages from the judgment of Lord Keith:

> In the end of the day the question is whether the circumstances under which a servant has made the fraudulent misrepresentation which has caused loss to an innocent party contracting with him are such as to make it just for the employer to bear the loss. *Such circumstances exist where the employer by words or conduct has induced the injured party to believe that the servant was acting in the lawful course of the employer's business. They do not exist where such belief, although it is present, has been brought about through misguided reliance on the servant himself, when the servant is not authorised to do what he is purporting to do, when what he is purporting to do is not within the class of acts that an employee in his position is usually authorised to do, and when the employer has done nothing to represent that he is authorised to do it*. In the present case Mr Magelssen was not authorised to enter into the three year charterparty, to do so was not within the usual authority of an employee holding his position, and Armagas knew it, and Mundogas had done nothing to represent that he was authorised to do so. It was contended for Armagas that concluding the contract for the sale of the vessel was within Mr Magelssen's actual authority, and that inducing the sale by falsely representing that he had authority to enter into the charterparty amounted to no more than an improper method of performing what he was employed to do, such as in other contexts was sufficient to attract vicarious liability. But the sale of a ship backed by a three year charterparty is a transaction of a wholly different character from a straightforward sale, even if the charterparty is not to be regarded as a transaction separate and distinct from the sale, and Mr Jensen and Mr Dannesboe knew that Mr Magelssen had no authority to enter into a transaction of that character on his own responsibility.

[59] However it is clear from the above that the argument of the misguided reliance by the third party on the agent cannot succeed if the following three elements can be shown, namely:

(a) the agent was not authorised to do what he purported to do;

(b) what the agent purported to do was not within the class of act an agent in his position was usually authorised to do; and

(c) the employer did nothing to represent that the agent was authorised to do it.

[60] In that case, the House of Lords found, on the facts, that all three were established such that no liability could be found on the part of the principal employer. It was held that the agent was in reality holding out himself as having authority to do a specific thing that the third party knew that he had no general authority to do, and that in essence, agents cannot self-authorise.

[61] In the instant case however, as I have stated earlier, the act in question, being concerned with the extension of the policy that turned out to be a forgery, although not in fact authorised by the defendant, was clearly within the scope of the authority of the agent in the sense that it was within the class of acts that an agent similarly circumstanced would be authorised to do. This ground

alone would mean that in accordance with *Armagas v Mundogas*, the defendant cannot validly pursue the misguided reliance on agent argument against the plaintiff since not all three elements could be established by the defendant.

[62] In any event, regardless, the defendant would also fail on the third element, since there is ample evidence to show that the defendant by its conduct had induced the plaintiff to believe that the agent was authorised to do what he did. The previous extension to the policy, handled by the agent on behalf of the defendant, perfectly legitimately, is one sure example to such effect. As such this contention by the defendant is similarly unmeritorious.

Loss notification to agent instead of to defendant

[63] In addition, the notification of claim clause in general condition No 5 (read with general condition No 1) of the policy stipulates that, upon the occurrence of a matter giving rise to a claim, the plaintiff ought to 'immediately notify the Operator by the telephone or telegram as well as in writing' and that no Takaful benefits shall be paid where 'no notice has been received by the Operator within 14 days of its occurrence'.

[64] Yet the defendant did not receive any formal notification from the plaintiff until very much later by way of a letter dated 28 January 2015. This clearly does not comply with the requirement of general condition No 5 (read with general condition No 1). The plaintiff's argument that the plaintiff had reported the incident which happened on 2 July 2014 to the defendant's agent two days later on 4 July 2014 is not supported in that the agent in his testimony as DW3 confirmed that the purported letter from the plaintiff dated 4 July 2014 to the agent was in fact prepared by the agent himself. In any event, even if there was formal notification to the agent, the defendant submitted that case law authorities have established that notification of claim to the agent of an insurer is insufficient.

[65] I accept that as a matter of fact, it is in evidence that the defendant was not notified of the plaintiff's alleged loss within 14 days of its occurrence. The former only received formal notification of the same directly from the latter by way of a letter from the plaintiff dated 28 January 2015, which was about six months after the incident on 2 July 2014.

[66] The provisions in general conditions 1 ('Conditions Precedent') and 5 ('Claims Procedure'), given their relevance, are stated hereunder:

> 1. Conditions Precedent
>
> The due observance and fulfillment of the terms of this Certificate in so far as they relate to anything to be done or complied with by the Participant and the truth of

the statement and answers in the questionnaire and proposal made by the Participant shall be a condition precedent to any liability of the Operator. A

5. Claims Procedure

In the event of any occurrence which might give rise to a claim under this Certificate, the Participant shall: B

(a) Immediately notify the Operator by telephone or telegram as well as in writing, giving an indication as to the nature and extent of loss or damage;

...

Takaful benefits shall not in any case be paid for loss, damage or liability in respect of which no notice has been received by the Operator within 14 days of its occurrence. C

[67] However, having considered the law applicable to the facts and evidence before this court, I am of the view that the submission made by the defendant on this point is considerably lacking in merits. I say so because of the following reasons. First, the defendant does not in its submissions, address the relevance of s 182 of the Contracts Act 1950 to the instant case which provision, in clear and unmistakable terms, deems any notice given to an agent in the course of business for the principal as having been given to the principal. It states as follows: D E

Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal. F

[68] Nor does the section (or either of its two illustrations in (a) and (b)) stipulate or envisage that the notice must necessarily be in written form. Verbal notice is accordingly well within the contemplation and scope of s 182. As such, in the instant case, the verbal notice given by the plaintiff (by PW1) to the agent on 4 July 2014, which was merely two days after the incident which caused the alleged loss giving rise to the claim under the policy is by virtue of s 182 also deemed given to the defendant at the same time. Furthermore, as stated earlier in this judgment, s 12(1) of Schedule 9 to the IFSA clearly deems the knowledge of a Takaful agent to be that of the Takaful operator. G H

[69] Secondly, the cases referred to by the defendant to support its contention on the need for strict compliance with the loss notification requirement, crucially, did not consider the applicability and relevance of s 182 of the Contracts Act 1950. Since these cases, including *Teck Liong (EM) Sdn Bhd v Hong Leong Assurance Sdn Bhd and another suit* [2002] 1 MLJ 300; [2001] 7 CLJ 457, *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244, *Lee Seng Heng v Guardian Assurance Co Ltd* [1977] 1 MLJ I

244, as well as certainly English cases such as *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 2 All ER 395; [1985] 1 Lloyd's Rep 274 did not consider s 182 of the Contracts Act 1950, these cases do very little to promote this argument of the defendant.

[70] Thirdly, the defendant made specific reference to the Court of Appeal decision in *AXA Affin Assurance Bhd v MTD Construction Sdn Bhd* [2013] 6 MLJ 323 which according to the defendant, entrenched the need for strict compliance with a loss notification provision which is a condition precedent to any liability of the insurer, as is the position in the instant case. Passages from the reported judgment of the case were extensively reproduced in the written submissions of the defendant. A key part of the judgment reads as follows:

> [32] In our judgment, upon a literal construction of General Condition 5, the proviso to the same and General Condition 1, there was a clear obligation on the part of the respondent to have given notice of the claim within 14 days of the occurrence of each and every one of the incidents commencing the first incident on 2 October 1997. In our judgment, where the terms of the policy are clear, as in this case, then, the natural construction must prevail (see *Cassel v Lancashire and Yorkshire Accident Insurance Co Ltd* (1885) 1 TLR 495). In our opinion, the terms of the expressed proviso read with Condition 1 of the CAR Policy clearly manifest an intention on the part of the parties to treat the requirement to give the 14 day notice to be a condition precedent for the appellant to be liable under the CAR Policy. With respect, we are unable to accept the submission of learned counsel for the respondent that there is no such obligation so long as the respondent is of the view (subjective) that the incident may not give rise to a claim under the policy.

[71] But that case, in my review of the same, does not deal with a situation where notification is made to the agent of the insurer. The Court of Appeal merely emphasised the importance of the notice be given within the contractually stipulated 14 days to the insurer. In the instant case, it is in evidence that the plaintiff did notify the agent of the defendant. In *AXA Affin Assurance Bhd v MTD Construction Sdn Bhd*, no notice whatsoever was given to the insurer or its agent. Thus, this case too does not advance the contention of the defendant.

[72] Fourthly, the defendant had not raised any complaint about the alleged defective notification or the absence thereof in the correspondences with the plaintiff before commencement of this suit by the plaintiff. There is authority that renders this late objection, if not an afterthought altogether, as a further weakening of the defendant's defence. In the case of *Shan & Gooi (suing as a firm of advocates & solicitors) v Capital Insurance Bhd & Ors* [2011] MLJU 440; [2012] 8 CLJ 626, which had also accepted the validity and adequacy of oral notification, the High Court held the following:

> [26] *Notice is a procedural step, the object of which is to alert insurers to*

investigate the claim before the trail becomes cold. This is not the case here. The third defendant had ample opportunity to investigate the claim to ascertain if it was a false or fraudulent claim. *In any event, the third defendant had not raised the issue of breach of cl 5.2 in any of the correspondence with the plaintiff. In fact, save for the pleadings as contained in its defence, the 3rd defendant had not previously raised this issue at all.* Nor has the third defendant repudiated the claim. Nor has it notified the plaintiff whether the claim is accepted or rejected. The last correspondence from Cunningham informed the plaintiff that the plaintiff's claim had been submitted to the London Underwriters for their consideration. Why should the insurer submit the plaintiff's claim to the London Underwriters unless it had accepted the plaintiff's claim for processing?

[27] Clearly, this inordinate delay on the part of the third defendant in replying to the plaintiff and subsequently raising the technical defence of oral notification in breach of the letter and spirit of cl 7.2 speaks volumes about the third defendant's conduct. *The 3rd defendant's defence is merely an afterthought. In this regard, I agree that the third defendant must be estopped from unfairly denying liability to the plaintiff.* In the premise, I find that the plaintiff's oral notification in 1999 is on the facts sufficient and not prejudicial to the third defendant. *That oral notification suffices for the purpose of notice under cl 5.1.2.*

[73] Fifthly, there is even evidence that the loss notification clause was never strictly enforced by the defendant in any event, in that a notice given to the agent of the defendant could be considered as sufficient. This was made abundantly plain in the testimony given by the defendant's own witness, Ms Chong Sook Yin, the defendant's former Head of Finance, as DW1, in her cross-examination, as recorded in the notes of proceedings as follows:

SJM: No. Now can I take you to the next page 275? At the top of the page, 8.1.6, Clause 8.1.6 and 8.1.7 or 8.1.6. It talks about the 'obligation of the agent to notify the Operator immediately of any incident and circumstances may give rise to a claim'. So it allows for a situation where the client, like the Plaintiff can inform the agent and ask the agent to inform the Defendant?

Chong: Yes.

[74] In any event, it would be unconscionable for the defendant to even attempt to rely on the fraudulent conduct of its own agent to repudiate liability on the basis that the plaintiff did not give notice to the defendant within 14 days when the evidence clearly shows that the plaintiff had informed the defendant's agent within 14 days of the loss taking place. The defendant should rightfully be estopped from denying liability on the basis on the alleged non-adherence to the requirements of the policy.

Was the defendant negligent?

[75] I am also of the view that such non-insistent on compliance with the requirements of the policy on the part of the defendant to be not inconsistent with its level of enforcement of the other pertinent clauses of the Takaful contract. For example, it is clear from the testimony of DW1 that despite the terms of the policy between the plaintiff and the defendant which required the entire premium to be paid by the former within 60 days, the defendant would accept the requisite payments be made over a staggered period which was beyond the contractually stipulated 60 days, which was what exactly happened in the instant case.

[76] The weakness of the process relied on by the defendant is further exposed by the fact that the defendant did not even attempt to communicate with the plaintiff directly when the former wanted to notify the plaintiff that the premiums had not been received. Instead, the defendant chose to write in its letter dated 8 March 2012 to the agent and not contacting the plaintiff directly. This of course meant, as it did in the instant case, that the notification would never reach the plaintiff as the agent himself was the criminal who was by virtue of the communication from the defendant, able to perpetuate the wrong by covering up his crime. In fact, the plaintiff was not even indirectly informed of the alleged non-payment. The said letter was not even copied to the plaintiff, despite the evidence by DW1 that a copy should ordinarily be sent to customers.

[77] Furthermore, the defendant also did not show if any steps had been taken to even inform the plaintiff that the policy taken by the plaintiff had purportedly lapsed due to the said non-payment. It is submitted that at the very least the defendant should have issued a letter to inform the plaintiff of the fact that their policy was going to be cancelled or had been cancelled. This would have given the plaintiff some warning as to the problem and it would have allowed them to take steps to address the problem.

[78] It is not clear from the evidence whether there was proper monitoring on the part of the defendant to govern situations where payments are made to the agents instead of directly to the defendant. This does not assist the case of the defendant. The failure of the defendant to have the requisite infrastructure and check and balance system in place in its business operations enabled its agents, in this case the agent, to take advantage of the gaps therein.

[79] Whilst it is not disputed that both the plaintiff and the defendant did not know about the forgery when it occurred and that they are in many ways equally unfortunate victims of the crime committed by the agent of the defendant, the question is whether the law will hold the defendant liable

despite the absence of any authorisation by the defendant of the criminal act of the agent. If it is seen to be unfair to hold a party such as the defendant liable for a conduct which the party itself disapproved of, it would be equally unjust, if not more, to hold otherwise if the result is apportioning the loss entirely to the plaintiff who had adhered to the terms of the relationship between the parties.

[80] In my judgment, the situation is not one where the defendant could be said to be entirely blameless. It is true that the defendant had played absolutely no part in the criminal aspect of the forgery. The defendant categorically stated that the criminal act was a conduct not approved nor authorised and was wholeheartedly denounced by the defendant.

[81] There was however no evidence to show what control and monitoring mechanism that the defendant adopted to ensure that its agents do not abuse the procedure that allowed them to be in possession of premiums paid by the clients of the defendant are in fact channeled by the agents to the defendant as their principal. The defendant was aware of the practice of the payments of premiums being made to the defendant's agent. I thus agree with the contention of the plaintiff that the defendant must take responsibility for this lapse that had enabled its own agents to take advantage of the same and abuse the procedure and commit forgery instead.

[82] The fact that the agent in question had a long standing relationship with the plaintiff in that he handled almost all of the insurance requirements of the plaintiff, as admitted by Soo Jen Li, the administrative and accounts manager of the plaintiff from 2003–2013 ('PW4'), is in my assessment largely immaterial because at the relevant time, the agent was acting as agent on behalf of the defendant. In the instant case, the defendant had failed to ensure that payments which were made to its agents were properly monitored. It cannot be emphasised enough that the agent in question was at the material time that of the defendant. Surely the defendant, what more as a Takaful operator in the insurance and Takaful industry, must be attributed with a certain degree of accountability over the conduct of its own agents, regardless of whether such conduct is in fact authorised, provided it was performed in the course of business for which the agents were appointed. This is clearly stipulated in s 12 of Schedule 9 to the IFSA referred to earlier.

[83] Otherwise, if principals are free to disclaim liability when conduct of their agents (even if not approved of by the principals, but done in the course of business), causes loss to the contracting party, the essence and substance of

A the legal principle of principal-agency relationship is rendered of little utility, and the whole concept becomes practically unworkable and thus meaningless under the law. This finding is thus in my view in total congruence with policy considerations as well as in full accord with common sense.

B **[84]** The relationship between the defendant and the agent is embodied in a standard form agreement dated 1 June 2009. But neither was the plaintiff apprised of the scope of the relationship between the defendant and its agent, such as the agent, in order to be in any position to be alerted of any constraints on the duties of the defendant's agents. This was confirmed by Ms Chong Sook C Yin ('DW1'), who gave evidence that this agreement was not furnished to the defendant's customers, such as the plaintiff. It was also testified that the plaintiff was not advised of the duties of the defendant's agent or the limits of his duties and authority. I further observe that not that the agreement contained any relevant limitations in any event.

D

[85] In addition, it further appears, based on evidence, that the defendant had no issue with its agents dealing directly with their clients, even when it concerns the important aspect of the payment of premiums. It is worthy of emphasis that the evidence of DW1 in cross examination discloses two E significant points in this respect. The first is that, as mentioned, the defendant would permit for premium payments to be made to the defendant's agent first instead of insisting on the payments be effected directly to the defendant. It would seem acceptable for the agents of the defendant to first collect or receive the payments which would then be forwarded by the agents to the defendant F (although DW1 did say that for large amounts, many corporates would contact the insurance company directly).

[86] This is further validated by cl 1 of the Takaful contract, as mentioned G earlier, which deems payments received by the agent to be received by the defendant in any event. The second is that the defendant would allow delayed payments beyond the contractually stipulated 60-day period to pay the entire premium.

H **[87]** The defendant also, as mentioned, did not even inform the plaintiff of the fact that the former had sought to cancel the policy. The defendant cancelled the same on 14 May 2012 due to, from the defendant's standpoint, non-payment of the premiums. This policy was to run until 10 March 2014, before which the agent assisted in the further extension of the same.

I

[88] To this extent I agree with the contention of the plaintiff that the defendant could be said to have acted in breach of its duties to the plaintiff (see

the Court of Appeal decision in *Antara Steel Mills Sdn Bhd v CIMB Insurance Brokers Sdn Bhd* [2015] 6 MLJ 248).

[89] However, even if I found the defendant to be negligent, I accept the contention of the defendant that the law would not countenance or accord the plaintiff a greater protection under the law of tort than that for which the plaintiff had agreed to under the law of contract. The Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Bank Ltd and Others* [1986] AC 80 succinctly put the point as follows:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in the commercial relationship ...
>
> Their Lordships do not, however, accept the parties' mutual obligations in tort can be greater than those to be found expressly or by necessary implication in their contract.

[90] Regardless, given the shortcomings, I should also refer to the established presumption in law that parties to a contract do not intend that either party should be able rely on its own breach of obligations to avoid a contract or obtain any benefit under it, unless the contrary is clearly provided for by the contract (see the House of Lords decision in *New Zealand Shipping Company Limited v Société des Ateliers et Chantiers de France* [1919] AC 1). The leading textbook authority of *Chitty on Contracts* (30th Ed, 2008) at para 12.082 states that:

> Party Cannot Rely on His Own Breach
>
> It has been said that, as a matter of construction, unless the contract clearly provides to the contrary it will be presumed that it was not the intention of the parties that either should be entitled to rely on his own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under it. This presumption applies only to acts or omissions which constitute a breach by that party of an express or implied contractual obligation, or (possibly) of a non-contractual duty, owed by him to the other party ...

Thus, even though there is basis to find a case of negligence against the defendant, I consider it sufficient that the matter be adjudicated on the principal basis of the law of contract as it does not render the determination of the suit any less efficient or fair.

Is the claim limited to only 50% given the joint venture?

[91] The defendant further contended that the plaintiff is in any event not entitled to the full claim submitted by the plaintiff because pursuant to the

joint venture agreement, the plaintiff is entitled only to the payment of 50% of its claim, reflecting its shareholding position.

[92] The letter of award dated 16 February 2009 saw DBKL awarding the contract for the project valued at RM83,744,150.50, to the joint venture ('JV') constituted between the plaintiff and AS Masa Sdn Bhd ('ASM'), which both the plaintiff and ASM duly accepted in writing on 19 February 2009. It is in evidence that the joint venture itself had been established on 4 March 2008 pursuant to a joint venture agreement on even date ('the JV agreement'), which purpose was expressed to be to form the JV to procure the project from DBKL and to execute and perform the contract to be entered into between DBKL, PMSB and ASM in respect of the project. The JV agreement referred to the JV as 'Pertama Makmur — AS Masa JV'.

[93] As the project which was eventually awarded contained certain refinement in scope, the plaintiff and ASM entered into a supplement agreement dated 19 March 2009 ('the supplemental JV agreement') to the JV agreement to amend the definition of 'project' in the JV agreement in order to be consistent with the letter of award. The name of the JV was also amended under the supplemental JV agreement to 'Pertama Makmur Sdn Bhd JV AS Masa Sdn Bhd'. Significantly, the supplemental JV agreement expressly states that all other terms and conditions of the JV agreement will remain in full force and effect and the JV agreement and the supplemental JV agreement will be read as a single, integrated document, from the date of the latter.

[94] Of importance to the instant case are cll 2.4 and 2.5 of the JV agreement, which state as follows:

> *2.4 Shares*
>
> The shares and participation of each party in the Joint Venture will be as follows:
>
> (a) PMSB — 50%
>
> (b) ASM — 50%
>
> *2.5 Profits and losses*
>
> The parties will share in all profit and losses arising out of or in connection with the performance of the Principal Contract in the proportions specified in clause 2.4 and will be liable in the same proportions for all incomes, costs and expenses, guarantees and pecuniary obligations which may be incurred by the Joint Venture.

[95] The letter of award had required the joint venture, before commencement of the project, to take out, amongst others, the requisite contractors' all risk policy of insurance. The plaintiff thus took out a contractors' all risk Takaful policies with the defendant, for the project, through the agent.

[96] As such it is difficult to arrive at any finding other than that based on particularly cll 2.4 and 2.5 of the JV agreement, the plaintiff is unmistakably entitled to claim only up to 50% of the alleged losses suffered, in accordance with its proportion to the plaintiff's share in the JV.

[97] Two witnesses of the defendant, Gary Tan ('PW3') and Ms Soo Jen Li ('PW4') sought to justify the claim by the plaintiff being made on a 100% basis, purportedly on the premise that the plaintiff had taken over the project entirely from ASM who had actually sold its 50% entitlement to the plaintiff. This allegation which, it must be pointed out was raised for the first time by the plaintiff's abovementioned witnesses in their evidence, was however not only not in the pleadings, but more fundamentally conflicted with the plaintiff's own pleaded case; for the re-amended statement of claim dated 21 April 2016 plainly referred to the JV as the pertinent party in respect of the award and acceptance of the project. Certainly there is no hint in the pleading of the JV being wholly owned by the plaintiff.

[98] Furthermore, the policy itself made reference to the acronym 'FTRR & I', which, as testified by Gary Tan ('PW3') and Kamariah bt Mohd Amin, a claims manager for the defendant ('DW2') means 'for their respective rights and interests'. This must plainly mean, as was indeed ruled by the English Court of Appeal in *Beacon Carpets Ltd v Kirby and another* [1984] 2 All ER 726 that the insurance proceeds belong to the parties in shares proportionate to their respective interests in the property insured. This is also patently consistent with and gives effect to cll 2.4 and 2.5 of the joint venture agreement.

[99] The plaintiff objected to this question being raised for the first time during the cross-examination as this issue was neither included in the pleadings by the defendant nor formed part of the statement of issues to be tried. The plaintiff further submitted that the plaintiff's PW4 had also testified that AS Masa Sdn Bhd, the joint venture party had in fact sold its 50% entitlement to the plaintiff. The plaintiff further contended that at all material time, the defendant, as confirmed by DW2, only dealt with the plaintiff directly without raising any concern with regards to the participation of AS Masa Sdn Bhd.

[100] I agree with the contention of the defendant however that the fact that the project was awarded to the JV and that the JV had entered into the JV agreement and the supplemental JV agreement, are facts within the personal knowledge of the plaintiff. These facts and the documents related thereto were put into evidence by the plaintiff and are referred to in the plaintiff's own pleadings. In addition, the interpretation of the JV agreement and the supplemental JV agreement are to be rightfully considered more to be in the

nature of questions of law and not material facts that are mandatorily required to be pleaded (see O 18 r 11 of the Rules of Court 2012).

[101] In this connection, it bears emphasis that common law has established a number of important principles in the interpretation of contracts, one of which, especially pertinent for present purposes is that the construction of contract, such as the JV agreement in the instant case, is a question of law for determination by the court and not by witnesses through their evidence. In *Bahamas International Trust Co Ltd and another v Threadgold* [1974] 3 All ER 881; [1974] 1 WLR 1514, Lord Diplock stated the following:

> In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.

[102] This principle has since been emphatically followed in Malaysian cases, such as in the Court of Appeal decision in *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38; [2002] 2 MLRA 510.

[103] Equally significantly, the evidence given by PW3 and PW4 which attempted to provide clarification on this point was found wanting. Firstly it contradicted the plaintiff's own pleaded case, which in para 3 of its re-amended statement of claim dated 21 April 2016 clearly reiterates the 50/50 ownership arrangement. Secondly PW4's attempt, during her cross-examination, to attribute the explanation of the claimed 100% ownership of the JV by the plaintiff to cl 5 of the supplemental agreement which concerns authorised signatory is plainly irrelevant and baseless. The exchange on this went as follows:

> TSD: Then you went on to give evidence that Pertama Makmur has acquired AS Masa's 50% interest in the joint venture. So in other words, it's no longer a joint venture, and that the works were carried out by Pertama Makmur singularly. Singularly carried out by Pertama Makmur. Any documents to back up what you have just said, Ms Soo?
>
> JEN: The Supplemental Joint Venture Agreement.
>
> TSD: Show me, please? Which part of the Supplemental Joint Venture

Agreement backs up what you are saying, please? A

JEN: Page 45 which is the Supplemental Agreement to Joint Venture Agreement.

TSD: So which part of the Supplemental Joint Venture Agreement backs up what you just said? B

JEN: On page 48. No 5, Authorized Signatory. All parties agree to and confirm that En Norjan Baharom....is authorized to sign all correspondence, confirmations, notices or other documents for and on behalf of Joint Venture to DBKL or any third party in respect of the Project. C

TSD: That is, so your answer to my question was this emphatic. You said, of course there is a document to back up what I am saying, it's the Supplemental JVA, Clause 5. That's what you are saying?

JEN: Yes. D

[104] Even a cursory review of the said cl 5 on authorised signatory will readily show that it has absolutely nothing to do with the shareholding or ownership of the JV, much less the alleged change in ownership. E

[105] More importantly, above all, I readily hold that given the clear pleadings and express statements in the JV agreement and supplemental agreement, being documents tendered by the plaintiff itself, all of which are not in congruence with the testimony in respect of the issue of the alleged change in ownership of the JV given by PW3 and PW4 who failed to refute the statements contained in the documents, no prejudice could be said to have been occasioned to the plaintiff. F

[106] In other words, the defendant's case on this issue is based on documents introduced by the plaintiff. The witnesses of the latter could not substantiate what they asserted to be a change in the JV. I can thus do no better than make reference to the following often-quoted passages from the judgment of Raja Azlan Shah CJ (Malaya) (as his Highness then was) in the Federal Court decision in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10: G H

> In the present case, the material facts relating to the acknowledgement was not pleaded in the statement of claim; it was also not pleaded in the reply apart from stating that the law of limitation does not apply to the present action. That in our opinion is bad pleading. But it is a matter of indifference to the court whether the plea of acknowledgement is pleaded in the statement of claim or in the reply. If it is raised in the statement of claim, it would make a reply unnecessary and so reduce costs. A further advantage of pleading an acknowledgement in the statement of claim is that the defendant may thereby be led to refrain from raising the issue of limitation in the defence, thus narrowing the area of discovery and reducing costs: see *Bullen & Leake* (12th Ed) at p 638. Since the material facts and circumstances I

A were not pleaded in the statement of claim, it should have been pleaded in the reply. *Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before the High Court and we think there are materials on the record from which a decision to that effect could be arrived at.* As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant B was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (Emphasis added.)

[107] Accordingly, in my judgment, the plaintiff is entitled to claim only up C to 50% of the alleged losses suffered, in proportion to its share in the JV agreement.

Is the claim excessive and fraudulent?

D **[108]** In its defence, the defendant also asserted that the plaintiff is making a fraudulent claim. This thus constitutes a breach of general condition No 8 (read together with general condition No 1) of the policy. It is well established that a claim by an insured must be accompanied by the clear observance of the duty of good faith. In *Modern Universal Sdn Bhd v MSIG Insurance (M) Bhd* E *(formerly known as Hong Leong Assurance Bhd)* [2014] 11 MLJ 186 the High Court approvingly referred to the following passage from the text on *Law of Insurance* by the learned author, Poh Chu Chai (6th Ed):

> He is not allowed to put in a claim for an amount greater than what he had actually lost. If a claim is put in with the intention of defrauding the insurance company, for F instance, by exaggerating the amount claimed, then the whole claim is liable to be defeated on the ground that there has been a failure to exercise good faith. The exercise of good faith is fundamental to the relationship between the insurer and the insured.
>
> G Whether a particular claim is tainted with a fraudulent intent is largely a question of fact to be inferred from the surrounding circumstances. In *Central Bank of India Ltd v Guardian Assurance Co Ltd*. The Privy Council, hearing an appeal from India, took into account the financial position of the insured, the circumstances of the fire together with what was left after the fire in coming to the conclusion that the claim put forward by the insured was exaggerated and fraudulent. The respondents in this H case were insurers and they insured goods belonging to a J Rustomji who was the owner of a flour mill. The insured goods were pledge to the appellants, the Central Bank of India. The goods, consisting of wheat, wheat products and gunny sacks, were kept in godowns, during the currency of the policy, a fire broke out at the godowns and the insured goods were destroyed. The insured claimed that the I godowns were full and the goods stacked right up to the ceiling of the godowns at the time of the fire. The insured contended that the claim was exaggerated and fraudulent. The trial judge, decided in favour of the bank. This decision was reversed by the High Court and the bank appealed to the Privy Council. In affirming the decision of the High Court, Their Lordship decided that the claims were exaggerated and fraudulent. Lord Maugham said:

> The onus of proving a fraud was on the insurance company, [T] hat so far as the issue of fraud is involved in the case those who allege fraud ought to establish it by something more than grave suspicion, or, in other words, that the charge ought to be clearly established. There is other cogent evidence tending to show that all was not well with the mill and with the financial position of Seth Rustomji in the year 1926. The admitted fact that for some time before the fire the mills were working only six hours a day for a five-day week tends plainly to support the view that business had fallen off to a large extent, and adds weight to the suggestion that there was no reason why a mill proprietor in financial difficulty should keep so large an amount of capital locked up in godowns filled to the roofs so as to make convenient handling of the goods very difficult if not impossible. The indisputable facts as to the height of the debris in the godowns within a very short time of the discovery of the fire together with the evidence already mentioned, seem to Their Lordships to establish the untruth of the statements as to the contents of the godowns given by the witnesses on behalf of the plaintiffs, including Seth Rustomji himself.

[109] In the same vein, it has also been held that a claim would be construed to be false if an honest person would not make such a claim having regard to what the insured knew at the relevant time (see *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip* [1995] 3 MLJ 74). In the leading English Court of Appeal decision in *Agapitos and another v Agnew and others* [2002] 1 All ER (Comm) 714; [2003] QB 536 it was held that a fraudulent claim exists where the insured claims knowing that he suffered no loss, or only a lesser loss than that which he claims, or is reckless as to whether that is the case. The claim as a whole may be refused, inclusive of parts of the claim which are genuine, if the proportion of the claim represented by the fraudulent claim is material and substantial (see *Galloway v Guardian Royal Exchange (UK) Ltd* [1997] All ER (D) 14; [1997] EWCA Civ 2487).

[110] Having evaluated the evidence and considered the submissions of parties, I do not find sufficient evidence that the defendant had on a balance of probabilities successfully established the claim by the plaintiff to be fraudulent or excessive. The plaintiff's claim was made on the basis of the supporting documents available to the plaintiff then as well as on the premise of the invoices furnished by the contractors to rectify the damage and to reconstruct the tunnel following the collapse.

[111] These include, as listed in the common bundle of documents at trial, the summary of the claim, Tunnel BQ to DBKL, claims from TNB, Gas Malaysia, SYABAS and Prasarana as well as various invoices from suppliers, crane owners and sub contractors, and invoices from Industronics Bhd for cabling work for IT IS DBKL and extra costs to construct RC Tunnel. Further, at trial, the plaintiff disclosed that discounts had subsequently been given to the plaintiff by the relevant contractors and third parties, and the amount being

A claimed is as a result being reduced to RM5,510,859.81. This was done without any prompting by the defendant and thus justifiably cannot be characterised as reflecting the presence of bad faith on the part of the plaintiff in the presentation of its claim.

B **[112]** But it does not mean that the claims are all proven. That is to be determined in pursuance of the assessment of damages in respect of the claim. What I find at this stage is that there is insufficient evidence to found a fraudulent claim or excessive claim on the part of the claim made by the plaintiff, in respect of either the contention of the entitlement of the plaintiff to C only 50% of the total loss under the joint venture, or of the claim for material damage under section 1 of the policy.

[113] Even though I had found that the plaintiff is entitled to claim only 50% D of the total loss, this does not amount to any finding of the plaintiff being dishonest or reckless in the presentation of its claim. Neither does this claim appear to concern a fraudulent claim involving forged and falsified documents. The defendant has not satisfactorily shown sufficient evidence to justify a finding that the claim exhibited elements of being fraudulent or excessive even E in the sense of an exaggeration or a soft insurance fraud.

[114] It is also observed that as is apparent from the letters from the defendant to the plaintiff from January–March 2015, the defendant had merely focused its complaint that the agent had acted fraudulently and that the defendant was F thus not liable to the plaintiff. But the allegation on the claim being fraudulent or excessive had never been raised by the defendant before this suit. To my mind, this does not promote the argument of the defendant that the plaintiff's claim was not made in good faith. Neither did the defendant earlier state that it had repudiated liability on the basis that the claim is fraudulent, excessive and G not supported by documents.

[115] There is also this allegation by the plaintiff that the defendant should be estopped from challenging the insurance claim because the defendant simply failed to carry out a proper assessment of the claim filed by the plaintiff. The H defendant had in its possession all relevant material to perform the requisite assessment of the claims but instead pursued the appointment of solicitors and Crawford, the professional loss adjusters, and notified the plaintiff that the defendant was not admitting liability.

I **[116]** There is some substance in this contention, for even though the defendant's stand at all material times is evidenced by its and its solicitors' letters dated 30 January 2015, 4 March 2015, 27 March 2015, and 24 April 2015 (which stated to the effect that all documents which had been received from the plaintiff are strictly on a without prejudice basis and without

admissions as to their authenticity for the defendant's internal investigation), the defendant could not demonstrate efforts on their part to understand the situation concerning the insurance claims made by the plaintiff. Instead the defendant only chose to raise the issue of the claim being excessive and fraudulent at trial when the plaintiff could earlier have in good faith been advised of the concerns or issues the defendant had on the validity of the claim, despite their previous business relationship.

Does the insurance claim fall within CAR policy?

[117] Given the evaluation of the totality of evidence, I find sufficient basis to find that the claim by the plaintiff does come within the terms of the policy. This is premised predominantly on the evidence of the various documents furnished by the plaintiff to support its claim, which appear to be in relation to the losses said to be suffered by the plaintiff within the category of either 'material damage' which pertains to physical loss or damage from any cause necessitating repair or replacement under section I of the policy or 'third party liabilities' under section II, which essentially concerns accidental loss or damage to property belonging to third parties occurring in direct connection with the construction of items covered under section I in the vicinity of the site.

[118] However, I agree with the prayer of the plaintiff in its statement of claim which also seeks the assessment of damages to be performed by the registrar. This subsequent assessment proceeding will adjudicate on the veracity of these supporting documents and other evidence to justify the actual amount of loss claimable, and thus determine the extent of the success, if at all, of the plaintiff's case on the issue of quantum.

[119] In respect of the issue raised by the defendant on the third party claims by TNB, Gas Malaysia and Syabas, it is conceded by the plaintiff at trial that there was no statement by any of its witnesses that showed that the plaintiff had inquired with the relevant authorities concerning the exact position of TNB, Gas Malaysia, and SYABAS' cables, pipes or other underground facilities prior to the commencement of the project, as stipulated under cl EN0043 of the policy.

[120] The witness statement of Dato' Ir Haji Manan Amir, the project's consultant engineer ('PW5') however clearly dealt with the issue of the mapping of the underground facilities where the drawings were endorsed by him as the representative of the employer of the project. I do not consider this mapping exercise to be insufficient for the purposes of cl EN0043 that could

justify outright rejection of the claim.

[121] Similarly, under cl EN0032 of the policy, the defendant is liable to indemnify the plaintiff if there is total or partial collapse of any property, land or building. But two witnesses of the plaintiff, Nor Azman bin Ahmad, the project manager ('PW2') and Gary Tan ('PW3') agreed during cross-examination that there was no total or partial collapse of the monorail MRT line. But the evidence given by these two witnesses did highlight that the claim had been made because there was a stoppage of operations resulting in Prasarana making a claim against the plaintiff following the incident.

[122] Whilst such testimony may not provide an answer to the defendant's insistence for strict compliance with EN0032, I find merit in the submission of the plaintiff that section 11 of the policy which is referred to in EN0032 clearly stipulates that where there is damage to a third party property, the defendant is obliged to compensate the plaintiff or accept liability for the damage. It is imperative to note that section 11 is a specific provision on third party liability and does not make reference to any qualification on total or partial collapse.

[123] It is well-established that a specific provision in a contract should take precedence over its general provisions. Not only is the rule that the general is taken to give way to the specific applicable to the instant case (see the English Court of Appeal decision in *Yarm Road Ltd and another v Hewden Tower Cranes Ltd* [2003] All ER (D) 04 (Aug); [2003] EWCA Civ 1127) but also that the principle that any doubt or ambiguity in insurance policy should be construed in favour of the insured, should too (see *Central Lorry Service Co Sdn Bhd v The American Insurance Co* [1981] 2 MLJ 40).

CONCLUSION

[124] On the totality of evidence, and for the reasons I have discussed, it is my judgment that the plaintiff has successfully proven its claim against the defendant on a balance of probabilities, who is therefore liable to the claims for losses under the policy/extended policy suffered by the plaintiff, which however is limited to only 50% of the total claims arising from the losses which in any event is to be assessed by the registrar.

[125] I therefore allow para 32(a) of the re-amended statement of claim of the plaintiff which alternatively prayed for damages to be assessed, and direct that damages be assessed by the registrar; para 32(b) on interest at 5% annually on the damages to be so assessed, and para 32(c) on costs.

Plaintiff's claim allowed.

Reported by Dzulqarnain Ab Fatar